

# Accessibility, the Law and e-Repositories

Legal Aspects of e-Repositories and e-Collections  
JISC Legal/University of Warwick, 1 June 2006

Martin Sloan, Solicitor  
Brodies LLP

Email: [martin.sloan@brodies.co.uk](mailto:martin.sloan@brodies.co.uk)  
<http://www.brodies.co.uk>

# Outline

- Introduction to accessibility
- WCAG
- PAS:78
- Legal background
- How does the law apply to e-repositories?
- Conclusions

**Websites that impede disabled users face legal action**

The Times, 14 April 2004

# Introduction to accessibility

- Original concept of the Internet
  - Platform (ie hardware) independent
  - Universal (ie for all)
  - Method of sharing information irrespective of disability

# How do people with disabilities use the Internet?

- Screen magnifier
- Custom style sheets (CSS)
- Screen reader software
- Braille displays
- Keyboard
- Alternative input devices

# Why are websites inaccessible?

- Erosion of these principles
- Blurring of design vs content principles
- Use of proprietary (ie non-standard) technologies
  - Flash, Java, Shockwave, PDFs
  - Content provided in non-HTML format

# What problems do inaccessible websites cause?

- Visually impaired person may not be able to read content displayed in graphical form (eg using images, video, Flash)
- Use of Java to control navigation may not be accessible to someone who cannot use a mouse
- Content made available in audio format may be inaccessible to someone with hearing impairments
- Not just websites - also applies to software applications!

# Common accessibility barriers

- Reliance on graphics
- Video and audio content
- “bad” site design/usability issues
- Use of inaccessible formats – eg Flash, PDFs etc

# But I thought that PDFs are accessible?

- Latest versions of some proprietary technologies include accessibility features
- But – the user may need to have the latest software/hardware to use these
  - How do you know what hardware/software your students are using?
- Legacy content
- Remember that correctly coded HTML is the most accessible format for ALL users

# Web Accessibility Initiative

- World Wide Web Consortium (W3C)
- Web Accessibility Initiative (WAI)
  - Web Content Accessibility Guidelines (WCAG)
  - Authoring Tool Accessibility Guidelines (ATAG)
  - User Agent Accessibility Guidelines (UAAG)
- Launched in May 1999
- Version 2 guidelines currently in development
- But remember that ticking all the boxes does not necessarily mean your site is accessible – user test

# PAS:78

- *PAS78: Guide to Good Practice in commissioning accessible websites*
- Publicly Available Specification (not a BSI)
- Launched March 2006
- Follow up to DRC Formal Investigation
- Sets out guidance for procuring an accessible website:
  - References WAI WCAG
  - Emphasises user testing and accessibility policies
  - Sponsored by DRC – good practice to follow!

# What does the law say?

- Disability Discrimination Act 1995 (DDA)
- SEN and Disability Act 2001 (SENDA) (amends the DDA)
- Disability Equality Duty (DED)
- Public Contracts Regulations 2006/Public Contracts (Scotland) Regulations 2006
- Copyright (Visually Impaired Persons) Act 2002

# Codes of Practice

- Codes of Practice
  - Part II Code of Practice
  - Part III Code of Practice
  - Part IV Code of Practice
- “flesh out” the DDA
- Provides guidance and aims to **avoid** legal action
- **Not** an authoritative statement of the law

# Disability Discrimination Act 1995

“...a universal, all embracing right of non-discrimination against disabled people...applicable to all providers of goods, facilities and services to the general public.”

Minister for Social Security and Disabled People  
*Hansard*, H.C. Standing Committee, E col.290

# What does the DDA say?

- Wide definition of disability
- DDA originally applied to employers (Part II) and the providers of goods, facilities, services and premises (Part III)
- SENDA introduced new obligations on educational institutions
  - Created a new Part IV of the DDA
- Disability Equality Duty (DED)

# Part II of the DDA

- Applies to employers in all sectors
- Duty to make reasonable adjustments where any provision, criterion or practice applied by the employer places the disabled person concerned at a substantial disadvantage
- Covers ICT provision, software etc provided in the course of employment
  - Relevant where an employee is obliged to use an e-repository as part of his employment

# Part III of the DDA

- Applies to “service providers”
- “service provider” is not explicitly defined in the DDA or the Part III Code
- But, generally considered to include operators of websites/web delivered services - see example in revised Part III Code
- DDA explicitly includes “free” services
- Part III does **not** generally apply to educational institutions (but may still relevant to online learning environments)

# Part III obligations

- Duties set out under section 19:
  - Not to refuse to provide or deliberately not provide any service which he provides or is prepared to provide to the public
  - To comply with any s.21 duty to make “reasonable adjustments”
  - Not to provide a lower standard or manner of service

# Discrimination defined

- A provider of services discriminates against a disabled person if:
  - For a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not apply, and
  - He cannot show that the treatment in question is justified

# Reasonable adjustments

- Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service...it is his duty to take such steps as are reasonable...to have to take in order to change that practice, policy or procedure so that it no longer has that effect (s.21)

# What is reasonable?

- *Maguire v SOCOG* case
  - Australian case involving Sydney Olympics website
  - Court held that it was reasonable to expect that SOCOG should make its website accessible
  - Unjustifiable hardship argument rejected

# Part IV of the DDA

- Applies to educational institutions
  - Includes higher and further education institutions and colleges
- Confers similar rights on students as those available against service providers under Part III of the DDA

# What does Part IV say?

- Not to treat disabled students less favourably without justification
- To make reasonable adjustments so that students are not at a substantial disadvantage compared to those who are not disabled

# Part IV obligations

- Duties set out under s.28R:
  - Not to discriminate in the arrangements for determining admission
  - Not to discriminate in the “student services” it provides or offers to provide
  - Not to discriminate against a disabled student by excluding him from the institution, whether permanently or temporarily

# What is a “student service”?

- Services of any description which are provided wholly or mainly for students
- Includes:
  - Teaching, curriculum design, assessments
  - informal/optional study sessions, distance learning, e-learning
  - learning equipment, libraries, IT facilities and their resources
- Likely to include online learning environments/access to e-Repositories where these form part of course

# Reasonable adjustments

- As with Part III, educational institutions have a duty to make reasonable adjustments when providing student services
  - Auxiliary aids and equipment
- Justification if external academic factors
  - eg Law Society/General Medical Council requirements
- Cost unlikely to be a justification – *Maguire*

# Disability Equality Duty (DED)

- Comes into force December 2006
- Obligations on public bodies (inc further/higher education institutions) to promote disability equality
- Proactive duty to promote accessibility/inclusiveness (as opposed to a duty not to discriminate)
  - Effectively introduces a “buy accessible” obligation

# Public Procurement Regulations 2006

- Came into force 31 January 2006
- Govern procurement by public bodies (including further/higher education institutions) (a “contracting authority”)
- Sets out requirements for technical specifications
- When laying down technical specifications:  
“contracting authority shall shall, wherever possible, take into account accessibility criteria for disabled persons...”
- Likely to pull in PAS:78 (relevant British standard) and WCAG (relevant international standard)

# Copyright (Visually Impaired Persons) Act 2002 (CVIPA)

- Amends Copyright, Designs and Patents Act 1988
- Allows educational institutions to provide accessible versions of inaccessible works, if not commercially available
- BUT only applies to literary, dramatic and musical works, not films/sound recordings
- Potential issues with databases

# So what does the law mean in practice?

- e-repositories will be covered by the DDA
  - e-repositories made available to the general public and/or staff/students at other institutions on an open basis will be covered by Part III of the DDA
  - e-repositories made available by an institution to its own employees/students (whether internal or access to a closed external repository) will be covered by Parts II and IV of the DDA respectively
- e-repository should be accessible to people with disabilities and, where possible materials provided through it should be provided in an accessible form

# Who is legally responsible?

- Under Part III, it is the provider of the e-repository!
- Who is that? Could be:
  - The institution that provides/hosts the e-Repository
  - Several institutions acting together
  - Another sponsor organisation (eg JISC, a funding council, research board, LTSN, government department etc)
- If an institution has obligations under Parts II or IV of the DDA, that institution will be responsible (even if providing access to an external service)

# So what do we have to do?

- DDA contains broad obligations
- No specific details of standards to be met
  - No equivalent of section 508 requirements
  - But WCAG and PAS78
- Need to consider how you can comply with your obligations
  - Not just a case of ticking boxes
  - Need to audit and assess e-repositories and consider where problems lie

# Making reasonable adjustments

- Remember – making an e-repository accessible may be easier/cheaper than other solutions
  - If used to provide course materials/as a e-learning solution, institution will have obligation to provide those materials in an accessible form
  - cost of making a document available in HTML vs the cost of producing it in Braille

# Factors for determining reasonableness

- Is it reasonable to make the service/content accessible?
- Is it reasonable and important to expect that a particular element is accessible?
- Is it reasonable to expect students (or anyone else) to be accessing material outside a controlled environment?

# External content providers

- E-Repository may incorporate materials from external content providers (eg other institutions/commercial providers)
- Even though the design of the service is out with your control, duties still apply:
  - If more than one provider, consider which is more accessible
  - Consider whether accessible copies can be made under the CVIPA or whether the rights holder will allow you to make an accessible version
  - Other reasonable steps?

# Internally hosted/accessed e-repositories

- Arguably higher standard of duty
- Consider site design/use of formats for materials placed in the repository:
  - WAI guidelines
  - Accessible texts in HTML format as well as PDF where possible
  - Caption and transcript video/audio
- If copyright is owned by a third party consider rights under CVIPA or licensing terms

# What about off the shelf software?

- Consider whether the product you are using is the latest/most accessible version
- Discuss accessibility issues with your software suppliers
- If using proprietary formats and you expect students to access from home, consider providing students with a CD containing the most up to date browser plug-ins

# What about materials that are inaccessible?

- Some materials may be inherently inaccessible
  - scanned documents
  - copyright laws/licence terms may prevent an institution making accessible copies
- Consider what other reasonable steps can be taken to overcome these problems
  - Copyright (Visually Impaired Persons) Act 2002

# Not just online

- Remember – Part IV also applies to access to IT facilities/IT itself
  - Need to consider whether the e-repository is accessible to all students, not just those that have latest browser software etc
- ICT equipment must be accessible to students
  - Wheel chair access to computer labs
  - Provision of auxiliary aids (eg additional software/hardware)

# Summary

- Duties are anticipatory – should not wait
- DDA requires that e-repositories are accessible, and where this is not possible, that reasonable adjustments are made
- DED/public procurement rules impose additional obligations
  - proactive
  - References to standards (PAS78?)
- ICT must also be accessible
- Remember importance of user testing

# Final thoughts

- Consider who has responsibility for different elements of e-repositories
  - Within an institution (individual departments or IT Dept?)
  - Multi institution E-repository (lead institution?)
- Develop guidelines for use of e-repositories and include an accessibility policy
- Consider accessibility problems – what steps can be taken to overcome these?

# More information?

- Disability Rights Commission: <http://www.drc-gb.org>
- PAS:78: <http://www.bsi-global.com>
- TechDIS website: <http://www.techdis.ac.uk>
- UK Resources for Web Accessibility and the Law: <http://www.web-accessibility.org.uk>
- W3C Web Accessibility Initiative: <http://www.w3.org/wai/>

# Accessibility, the Law and e-Repositories

Legal Aspects of e-Repositories and e-Collections  
JISC Legal/University of Warwick, 1 June 2006

Martin Sloan, Solicitor  
Brodies LLP

Email: [martin.sloan@brodies.co.uk](mailto:martin.sloan@brodies.co.uk)  
<http://www.brodies.co.uk>